SINGAPORE REPORTS

MALAYAN INSURANCE COMPANY INCORPORATED v. CHEK BROTHERS CONSTRUCTION COMPANY

[C.A. (Chua, Choor Singh and Tan Ah Tah JJ.)

September 29, 1972]

[Singapore — Civil Appeal No. 26 of 1972]

Arbitration — Duty of arbitrator to decide question or questions submitted to him for decision and not to go beyond that — Arbitrator exceeding authority — Motion to set aside decision — Appeal to Court of Appeal.

In this case the respondent had taken out a public liability policy with the appellant to indemnify it against claims arising out of or in connection with the construction of a retaining wall. Whilst the work was in progress, there was a collapse of earth causing damage to adjoining properties. The owners of those properties made claims which were settled. The respondent then claimed against the appellant under the policy. The matter was referred to a sole arbitrator and it was agreed that the arbitrator should, apart from the question of quantum, decide the issue of liability on the two defences pleaded namely, (1) that the exclusion clause (f) in the policy excluded liability for damage caused by pile driving, subsidence or demolition or resulting from the removal or weakening of support and (2) that the respondent had failed to take reasonable and proper precautions to prevent the accident as required by the outside liability provisions. The arbitrator held that the respondent was not entitled to succeed because there was no fault or negligence on the part of the respondent and he dismissed the respondent's claim. On a motion to set aside the award of the arbitrator, Wee Chong Jin C.J. held that the arbitrator had exceeded his authority and he made an order that the award be remitted to the arbitrator with a direction that a proper award in favour of the respondent be made by him without regard to the issue of fault or negligence of the respondent or his employees. The appellant appealed.

Held: an arbitrator must decide the question or questions submitted to him for decision and he must not go beyond that. In this case the learned Chief Justice was right in holding that the arbitrator had gone beyond his jurisdiction in dismissing the respondent's claim on a ground which was not specifically pleaded and which was not referred to him.

Cases referred to:

(1) *Re Green and Co. and Balfour, Williamson & Co.* (1890) 63 L.T. 325.

(2) *Bond Air Services Ltd.* v. *Hill* [1955] 2 All E.R. 476.

COURT OF APPEAL.

James C. Chen for the appellants.

L. A. J. Smith (*Ong Tiang Choon* with him) for the respondents.

Chua J. (delivering judgment of the court): This appeal arises from a claim under a public liability policy issued by the appellant to indemnify the respondent against claims arising in connection with the construction and completion of a retaining wall by the respondent at Daisy Park, Braddell Road. Whilst work was in progress there was a collapse of earth causing damage to certain adjoining properties. The owners of the property damaged by the collapse made claims which were settled. The respondent then claimed against the appellant. The appellant repudiated liability and Mr. H. F. Sheppard was appointed the sole arbitrator to determine the dispute between the parties.

Points of claim and points of defence were filed with the arbitrator. In the points of defence the appellant repudiated liability on the grounds (1) that no liability lay due to the exclusion clause (f) and (2) that the respondent had failed to take reasonable and proper precautions to prevent the accident as required by the outside liability provisions and that such failure was the sole cause or alternatively contributed to the alleged damages.

The exclusion clause (f) excludes liability for damage caused by piledriving, subsidence or demolition or resulting from the removal or weakening of support.

At the hearing before the arbitrator the respondent called evidence and after the close of the respondent's case the appellant decided not to call any evidence. During his submission to the arbitrator counsel for the appellant abandoned the appellant's previous claim that the respondent had failed to take reasonable and proper precautions but contended that, in the light of the evidence adduced by the respondent, the collapse of the earth was due to heavy rain and was not attributable to any fault or negligence of the respondent or of his employees or to any defect in the way the work was carried out and therefore the respondent had no claim as under clause (b) of the outside liability provisions the risk covered by the policy is limited to damage caused through the fault or negligence of the insured or of his employees or to any defect in the way the work was carried out.

The arbitrator though finding against the appellant on the first ground of defence held that the respondent was not entitled to succeed because there was no fault or negligence on the part of the respondent and dismissed the respondent's claim.

The respondent by way of originating motion moved the High Court for an order that the award of the arbitrator be set aside on the ground that the arbitrator "exceeded his authority by including matters in the award which were not within the terms of the arbitration agreement, namely, the issue of whether the appellant's liability arose under the policy because there was no fault or negligence in the insured or their employees".

The learned Chief Justice who heard the motion agreed with the contention of the respondent and he made an order that the award be remitted to the arbitrator with a direction that a proper award in favour of the respondent be made by him without regard to the issue of fault or negligence of the respondent or his employees.

The learned Chief Justice in his oral judgment said that the construction of clause (b) of the outside liability provisions of the policy was not specifically pleaded in the points of defence and that being so on the authority of *Re Green & Co. and Balfour, Williamson, & Co.*[1] the arbitrator had gone beyond his jurisdiction in dismissing the respondent's claim on that ground.

Before us it was submitted by counsel for the appellant that the learned Chief Justice was wrong in holding that the construction of clause (b) of the outside liability provisions was not specifically pleaded in the points of defence. Counsel stated that the

construction of this clause was raised both by the respondent in the points of claim and by the appellant in the points of defence. He relied on paragraph 2 of the points of claim and paragraph 2 of the points of defence.

Paragraph 2 of the points of claim merely states that the respondent took out the policy and it then sets out the terms of clause (b) of the outside liability provisions. In paragraph 2 of the points of defence the appellant stated that he admitted "the allegations contained in paragraphs 2 and 6 of the points of claim but will rely on the terms and conditions of the said Policy of Insurance for their full terms and effect" We do not agree with the submission that the construction of clause (b) had been specifically raised in the pleadings.

Next it was submitted that the construction of clause (b) was before the arbitrator by virtue of paragraph 5 of the points of defence. Paragraph 5 was a general traverse and it is in common form. As a general traverse it did not affirmatively set up as a defence the construction of clause (b).

The next point taken was that the learned Chief Justice was wrong in holding that the arbitrator had gone beyond his jurisdiction in dismissing the respondent's claim for the reasons given in the award of the arbitrator.

From the pleadings it is quite clear that when the parties went before the arbitrator they had agreed that the arbitrator should, apart from the question of quantum, decide the issue of liability on the two defences pleaded, namely (1) that the exclusion clause (f) in the policy excludes liability for damage caused by piledriving, subsidence or demolition or resulting from the removal or weakening of support and (2) that the respondent had failed to take reasonable and proper precautions to prevent the accident as required by the outside liability provisions.

The authorities show that an arbitrator must decide the question or questions submitted to him for decision and that he must not go beyond that.

In *Bond Air Services Ltd.* v. *Hill*[2] Lord Goddard C.J., in the course of his judgment said (at page 479):

"I do not think it can be doubted that, ordinarily, it is for the underwriter to prove a breach of condition, at least where he is not contending that the policy is void on the ground that there has been a breach of condition precedent to the formation of the policy. So, too, it is for him to prove an exception. The difference between a condition and an exception is that the former places some duty or responsibility on the assured, while the latter restricts the scope of the policy. That it is for the insurers who allege that the conditions were broken to prove it, has, I think, always been accepted, at least since Parke, B's judgment in *Barrett* v. *Jermy* ((1849), 3 Exch. 535 at p. 452)".

In *Re Green & Co. and Balfour, Williamson & Co.*, there was a contract for the sale of tinned salmon which provided "quality guaranteed good, merchantable, and equal to average of the spring pack of 1889 season C.R. Salmon . . . Any dispute to be settled by arbitration". Differences having arisen, arbitration proceedings took place. The arbitrators found that the salmon was not of the quality guaranteed, and directed, in accordance with an alleged custom in the Liverpool market, that the buyers should take delivery, subject to an allowance being made. It was held, by the Court of Appeal, that the only question referred was whether or not the goods were of the guaranteed quality; that the arbitrators had therefore exceeded their jurisdiction and that the award should be remitted to them for their reconsideration.

It was, therefore, for the appellant to plead it specifically in his points of defence if he had wished to submit to the arbitrator the construction of clause (b) of the outside liability provisions of the policy. This he failed to do and therefore the arbitrator had no jurisdiction to deal with that clause.

In our judgment the learned Chief Justice was correct in holding in this case that the arbitrator had gone beyond his jurisdiction in dismissing the respondent's claim on a ground which was not specifically pleaded and which was not referred to him.

For these reasons we dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *Laycock & Ong; Ong Tiang Choon & Co.*

PHUAH JEE SUAN v. NILA VASU PILLAI

[C.A. (Chua, Choor Singh and Tan Ah Tah JJ.), February 27, 1973]

[Singapore — Civil Appeal No. 3 of 1972]

Damages — Personal injuries — Quantum — Assessment — Whether court may add 20% to award owing to increase in cost of living — Lump sum award — Scaling down of award on the ground of overlapping — Increase in cost of living.

In this case the plaintiff had obtained damages for personal injuries suffered by her and caused by the negligent driving of the defendant. The Deputy Registrar assessed general damages in the sum of $28,800. The defendant thereupon appealed to the High Court on the ground that the Deputy Registrar having assessed general damages in the sum of $24,000 had wrongly increased them by 20%, that is, had added the sum of $4,800 to the award on the ground that there was a discernible trend of a twenty per cent increase in the recent awards of the High Court. Wee Chong Jin C.J. who heard the appeal reduced the award by the said sum of $4,800 ([1972] 1 M.L.J. 202). The plaintiff thereupon appealed to the Court of Appeal.

Held: dismissing the appeal: (1) the method adopted by the Deputy Registrar in assessing general damages was wrong;

(2) as there were several injuries the principle of overlapping was applicable and the Deputy Registrar was wrong in not scaling down the total on that account; he was also wrong in assessing total damages and then applying a blanket increase of 20%;

(3) a lump sum should have been awarded after taking into consideration all the relevant factors, including the increase in the cost of living;

(4) the amount of $24,000 awarded as general damages in this case was not so inordinately low as to be a wholly erroneous estimate of the damage.

Cases referred to:-

(1) *Senior* v. *Barker & Allen Ltd.* [1965] 1 W.L.R. 429.

(2) *H. West & Son Ltd.* v. *Shephard* [1964] A.C. 326.